4— 225

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 962.

THE UNITED STATES, APPELLANTS,

vs.

EDWARD B. RHEEM.

APPEAL FROM THE COURT OF CLAIMS.

FILED JANUARY 11, 1877.

Jan 11 27 1877

Docketed

SUPREME COURT OF THE UNITED STATES.

No. 962.

THE UNITED STATES, APPELLANTS, vs. EDWARD B. RHEEM.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.

	Original.	Print.
Original petition of discovery	1	1
Completed petition	2	1
Traverse	3	2
Plea of limitation	4	3
Final judgment of the court	5	3
Application for allowance of appeal	6	3
Order allowing same	6	4
Findings of fact and conclusions of law	7	4
Certificate	10	4

1 United States Court of Claims.

EDWARD B. RHEEM
v.
THE UNITED STATES. } No. 10588. Filed June 26, 1875.

To the honorable Court of Claims:

The petition of Edward B. Rheem, an officer of the Army of the United States:

From the 3d day of March, A. D. 1869, to the 1st day of February, A. D. 1870, the claimant was a second lieutenant of infantry in the Army of the United States. During a part of said period of time certain mileage and commutation of fuel and quarters due to the claimant from the United States were also unlawfully withheld.

The claimant, being unable to obtain a sufficient examination of the papers of the War Department relating thereto, cannot set forth with precision the amounts so withheld, and therefore prays the court to request the honorable Secretary of War to furnish a statement of the same.

No assignment or transfer of said claim, or of any part thereof, or of any interest therein, has been made, and no action thereon has been had by Congress or any of the Departments, except as herein stated. The claimant is justly entitled to the amount herein claimed from the United States, after allowing all just credits and offsets.

He is a citizen of the United States, and is now an officer of the Army of the United States, and has at all times borne true allegiance to the Government of the United States, and has not in any way voluntarily aided or abetted or given encouragement to rebellion against said Government. He demands judgment against the United States for such sum as shall be found due to him by reason of the premises.

H. E. PAINE,
Claimant's Attorney.

DISTRICT OF COLUMBIA, *ss:*

H. E. Paine, having been duly sworn, says that he is the attorney of the claimant named in the foregoing petition, and believes the facts therein stated to be true.

H. E. PAINE.

Sworn and subscribed before me by H. E. Paine, this 26 day of June, A. D. 1875.

ARCH'B'D HOPKINS,
Ch. Clk. Court of Claims.

2 United States Court of Claims.

EDWARD B. RHEEM
vs.
THE UNITED STATES. } No. 10588.

Claimant's petition.—Filed May 17, 1876. *J. R.*

To the honorable Court of Claims:

The claimant was a lieutenant of infantry, in the Army of the United States, from Nov. 30, 1869, to Jan. 31, 1876. Upon the consolidation of the Army, under the act of March 3, 1869, he was ordered home to

await orders; and thereupon left his post at Camp Goodwin, A. T., and proceeded to his home, at Carlisle, Pennsylvania, and remained awaiting orders from Nov. 30, 1869, until Jan. 31, 1870, both days inclusive.

During said period of time the defendant furnished no quarters, and had no public quarters which could be furnished to the claimant at said Carlisle, and the claimant was entitled under section 37 of the act of July 28, 1866, and sections 1068, 1080, and 1081, of the Army Regulations, to commutations for $5\frac{5}{12}$ cords of wood, at the rate of $\$$—— per cord, amounting to $\$$——; also to commutations for quarters for 2 months and —— days, at the rate of $36 per month, amounting to $72. He was also entitled to mileage from his said post to his said home, for —— miles, at —— cents per mile, amounting to $\$$——. No part of said commutations of fuel and quarters, or of said mileage, has ever been paid, and of the pay and allowances due the claimant for the same period of time, the sum of $\$$ —— has also been unlawfully withheld. There is due to the claimant from the defendant, by reason of the premises, the sum of $96.65.

No action has been had by any of the Executive Departments or by Congress on this claim, of which the claimant is the sole owner; and no assignment or transfer of the same, or of any part thereof, or interest therein, has ever been made. The claimant is a citizen of the United States, and has at all times borne true allegiance to the Government of the United States, and has not in any way aided, abetted, or given encouragement to rebellion against the said Government; and he is justly entitled to the amount of this claim, after allowing all just credits and offsets.

The claimant demands judgment against the United States for the sum of $96.65.

PAINE & GRAFTON,
Claimant's Attorneys.

THE DISTRICT OF COLUMBIA, *ss:*

Benjamin F. Grafton, having been duly sworn, says that he is one of the attorneys of the claimant named in the foregoing petition, and believes the facts as stated in said petitition to be true.

B. F. GRAFTON.

Sworn and subscribed before me by B. F. Grafton, this 17 day of May, 1876.

[SEAL.] JOHN RANDOLPH,
Asst. Clk. Ct. Claims.

Claimant's post-office address, ———.
Post-office address of claimant's attorney, ———.

3 In the Court of Claims of the United States, December term, A. D. 1875.

EDWARD B. RHEEM
vs.
THE UNITED STATES. } No. 10588.

And now comes the Attorney-General, on behalf of the United States, and makes answer to the petition of the claimant herein; and, not confessing the same, or any part thereof, denies each and every the allegations therein contained, and calls for strict proof of the same.

And as to so much of the said petition as sets forth and avers that the

United States are indebted to the said claimant in the sum of ninety-six dollars and sixty-five cents, says that they are not indebted to the said claimant in the said sum of money, nor any part thereof.

And, as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against the said Government, denies the said allegation.

THOMAS SIMONS,
Assistant Attorney-General.

Filed June 26, 1876.

4 In the Court of Claims of the United States, Dec. term, 1876.

EDWARD B. RHEEM
vs.
THE UNITED STATES. } No. 10588.

Plea.

Now come the defendants, by their Attorney-General, and say that the claimant herein should not further have or maintain suit against the defendants for the reason that the petition of the claimant was not filed in this court nor transmitted to it within six years after the claim therein set forth first accrued.

Wherefore the defendants ask judgment, &c.

THOMAS SIMONS,
Assistant Attorney-General.

Filed Dec. 14, 1876.

5 In the Court of Claims.

EDWARD B. RHEEM
vs.
THE UNITED STATES. } 10588.

At a Court of Claims held at the Capitol, in the city of Washington, the 9th day of January, A. D. 1877, judgment was ordered to be entered up as follows:

The court, upon due consideration of the premises, find in favor of the claimant, and do order, adjudge, and decree that the said Edward B. Rheem, claimant, have and recover of and from the United States the sum of ninety-four dollars and seventy-five cents ($\$94\frac{75}{100}$.)

By the court:

A true copy of record.

6 In the Court of Claims of the United States, Dec. term, 1876.

EDWARD B. RHEEM
vs.
THE UNITED STATES. } No. 10588.

From the judgment rendered in the above-entitled cause, on January 9, 1877, in favor of claimant, the defendants, by their Attorney-Gen-

eral, on the 10th day of January, 1877, make application for, and give notice of, an appeal to the Supreme Court of the United States.

THOMAS SIMONS,
Asst. Attorney-General.

Filed January 10, 1877.

Ordered, That the appeal be allowed as prayed for.
By the court.

7 Court of Claims.

EDWARD B. RHEEM
vs.
THE UNITED STATES. } No. 10588.

FINDINGS OF FACT.

This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

1. The claimant, being a lieutenant of infantry in the Army of the United States from May, 1869, was, by special orders of August 19, 1869, from the Adjutant-General's Office, at his own request, ordered home to await orders, and left his post, Camp Goodwin, Arizona Territory, Sept. 30, 1869, reporting to the War Department, November 30, 1869, from Carlisle, Pa., as awaiting orders. By special order of Jan'y 29, 1870, from the Adjutant-General's Office, he was assigned to the 21st Regiment of Infantry, and directed to report at Carlisle Bar-
8 racks, Penn. It does not otherwise appear where the claimant's home was at any time.

2. While awaiting orders, from November 30, 1869, to Jany. 29, 1870, the claimant did not apply for quarters or fuel, and there were no quarters at Carlisle, Pa., subject to the control of the Quartermaster's Department, which could have been assigned to him. The rate allowed by the War Department for commutation of officers' quarters was $18 a room per month, and the price at which fuel was commuted by the Department at said Carlisle was $4.55 per cord.

CONCLUSIONS OF LAW.

1. The claimant was entitled to commutation of fuel and quarters while awaiting orders at Carlisle, Pa., from Nov. 30, 1869, to Jany. 29, 1870.

9 2. The commutation which he should recover is for quarters for 2 months, 2 rooms, at $18 per month each..... $72 00
And for fuel 2 months, 2½ cords per month, at $4.55 per cord... 22 75

94 75

By the court.

10 In the Court of Claims.

EDWARD B. RHEEM
vs.
THE UNITED STATES. } No. 10588.

I, John Randolph, Assistant Clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above entitled cause, and the final judgment of the court thereon, of the

application of the Attorney-General for the defendants for the allowance of an appeal, as filed in the clerk's office January 10, 1877, and of the order of the Court of Claims allowing the same of the findings of fact by the court and the conclusions of law thereon.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington this eleventh day of January, 1877.

[SEAL.]

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

(Indorsement on cover:) No. 962. The United States, appellants, vs. Edward B. Rheem, Court of Claims. Filed 11th January, 1877.

United States Supreme Court.

OCTOBER TERM, 1876.

THE UNITED STATES, Appellants,
vs.
EDWARD B. RHEEM, Appellee. } No. 962.

THE UNITED STATES, Appellants,
vs.
FREDERICK M. LYNDE, Appellee. } No. 963.

THE UNITED STATES, Appellants,
vs.
FREDERICK PHISTERER, Appellee. } No. 964.

APPEALS FROM THE COURT OF CAIMS.

STIPULATED FACTS.

It is stipulated that the following facts, which, upon request made by appellants with consent of appellees, the Court of Claims declined to embrace in its findings, shall be deemed a part of the record in each of the above-entitled causes.

EDWIN B. SMITH,
Assistant Attorney General,
For Appellants.

PAINE & GRAFTON,
For Appellees.

I.

The War and Treasury Departments have made the decisions set forth in the two following reports, on pages to inclusive.

REPORT OF THE WAR DEPARTMENT.

WAR DEPARTMENT,
WASHINGTON CITY, *November* 25, 1876.

To the Hon. the ATTORNEY GENERAL:

SIR: In reply to your letter of November 1, 1876, asking to be furnished with a copy or memorandum of all decisions made by the War Department since 1861 up to September 1, 1869, holding that officers awaiting orders are not entitled to mileage or commutation of fuel and quarters, or either, with the date of such decisions, with any evidence there may be tending to show knowledge of such, or any decisions on that subject by officers of the Army, I have the honor to transmit for your use the papers in the cases of the applications of Major-Generals W. S. Rosecrans, S. P. Heintzelman, and S. D. Sturgis; Brigadier-Generals W. W. Belknap and H. W. Brenham; Colonels Francis J. Lippitt and Henry B. Carrington; and of Major Brantz Mayer, for commutation of fuel and quarters while awaiting orders, which are the most prominent instances at hand to show the usual action of this Department in reference to the question.

The general rule which has governed the practice of this Department is based upon the principle, announced long since by the accounting officers of the Treasury, that the allowance for fuel and quarters was not a right of statutory authority, but a matter of executive regulation, under which this allowance belonged to officers as a matter of right only when they were assigned to some particular duty or work for the Government, or was granted to others only for strong reasons in executive discretion. Such special allowance, it is believed, has been generally confined to cases where officers were ordered to some place other than their established residence to await assignment to some particular duty upon which they were afterward placed. In this view commutation of fuel and quarters was regarded as an instrumentality for the performance of

some actual work for the Government, like a tent in the field, or a public horse lent a foot-officer for some particular service, and not as an emolument or provision for habitual personal expenses.

By express regulation, accordingly, in time of war, an officer in the field without other shelter than a tent afforded was not allowed this provision, although, if he had a family, the expenses of his household were rather augumented than diminished by the fact that he was required to live in a different place from them, and so furnished with camp-equipage.

The word "station," as used in the Regulations, was thus construed to mean a place of public service, where officers were at work for the Government, not one where they were casually staying, whether on leave of absence or while awaiting employment by a permission or order under which, as they knew very well or ought to have known, they would be allowed to select their own residence.

Very respectfully, your obedient servant,

J. D. CAMERON,
Secretary of War.

UNITED STATES OF AMERICA:

WAR DEPARTMENT,
WASHINGTON CITY, *December* 2, 1876.

Pursuant to section 882 of the Revised Statutes, I hereby certify that the annexed are true copies of the original papers on file in this Department.

In witness whereof I have hereunto set my hand and caused the seal of the War Department to be affixed on the day and year first above written.

[SEAL.]

J. D. CAMERON,
Secretary of War.

CASE OF COL. LIPPITT.

HEADQUARTERS DEPARTMENT OF THE PACIFIC,
SAN FRANCISCO, CAL., *July* 2, 1863.

SIR: The department commander instructs me to say that if the 2d Infantry company, which arrived at Fort Humbolt from Fort Gaston, is still at the first-named post, it will remain there until further orders. As soon as a sufficient number of companies are raised for the Mount-

aineer Battalion to garrison the posts in the district of Humbolt, abandoned by your companies of your regiment, the General desires you to turn over the command of the district to Lieutenant-Colonel Whipple. You will then report in person at these headquarters, where you will await further orders.

Very respectfully, your obed. servt.,

(Signed) RICHD. C. DUNN,
Asst. Adjt. Genl.

Colonel FRANCIS J. LIPPITT,
2d Infantry C. V., comd'g District of Humbolt, California.

Official. RICHARD DUNN,
Ass't Adjt. General.

QUARTERMASTER-GENERAL'S OFFICE.
WASHINGTON CITY, *Oct.* 16, 1863.

Lieut. Col. E. B. BABBITT,
Dep. Quartermaster-General, San Francisco, California:

COLONEL: The account inclosed in your letter of the 11th ultimo in favor of Col. F. J. Lippitt, 2d Regt. California Volunteers, for commutation of quarters and fuel at San Francisco, while awaiting orders, is herewith returned, and you are informed that the usual practice of this office, under the rulings of different Secretaries of War, has been to consider officers awaiting orders as not on duty in the sense to warrant a commutation of quarters and fuel.

The Judge Advocate General of the Army, in a decision approved by the Secretary of War, September 25, 1862, says that an officer waiting for orders cannot be properly regarded as on duty. His status approaches more nearly that of an officer absent from duty by leave.

In the case of Colonel Gates, referred to by you, commutation was allowed on the decision of Attorney-General Black, by order of Secretary Floyd. To test the universality of that decision an estimate was made for commutation of quarters for officers "awaiting orders," which was submitted to the Committee on Military Affairs, but no money has ever been approbriated for such a purpose. Subsequent accounts presented by Colonel Gates for a similar allowance have been disallowed.

It is now held that an officer to be entitled to quarters

and fuel must be properly assigned to some specific duty at a station. Very respectfully,

(Signed) CHRS. THOMAS,
Acting Quartermaster General.

The foregoing is a true copy.

E. B. BABBITT,
Deputy Quartermaster General.

QUARTERMASTER-GENERAL'S OFFICE,
WASHINGTON CITY, *January* 24, 1865.

Hon. EDWIN M. STANTON,
Secretary of War:

SIR: With reference to the claim of Francis J. Lippitt, late Colonel 2d Cal. Vol., for commutation of fuel and quarters, referred to this office for examination and report, I have the honor to report:

That the letter from the headquarters Department of the Pacific, dated San Francisco, Cal., July 2, 1863, under which Col. Lippitt claims commutation, directs him "to report in person at these headquarters when you (he) will *await further orders.*"

Commutation for quarters and fuel, under such circumstances, has been decided as not allowed.

The papers in the case are herewith respectfully returned.

I am, very respectfully, your obedient servant,

CHAS. THOMAS,
Bt. Brig. Gen. and Acting Q. M. Gen.

CASE OF GENERAL ROSECRANS.

POST OFFICE,
CINNINNATI, OHIO, *December* 14, 1864.

GENERAL: In obedience to General Order 295, C. S., I have the honor to report my arrival in Cincinnati, where I await orders.

I respectfully ask allowance of fuel and quarters here, or permission to reside anywhere within the State, on reporting my address to the army headquarters.

W. S. ROSECRANS.

By Genl. L. THOMAS,
Adj. Gen. U. S. A. Washington, D. C.

Respectfully referred to Maj.-Gen. Halleck, chief of staff.
By order of the Secretary of War.

E. D. TOWNSEND,
Asst. Adj. Gen.

A. G. OFFICE, *December* 20, 1864.

Submitted to the Secretary of War, who authorized General R. to receive commutation in Cincinnati, or to reside at any other point in Ohio, he notifying Adjutant-General of his address.

H. W. HALLECK,
U. S. Chf. of Staff.

DECEMBER 23, 1864.

CASE OF GENERAL BELKNAP.

KEOKUK, IOWA, *May* 31, 1866.

Major-General M. C. MEIGS,
Quartermaster-Gen. U. S. A.:

GENERAL: On July 27, 1865, the organization which I commanded, 4th Division 17th Corps, being mustered out of service, I was, by Special Order No. 3, headquarters Army of the Tennessee, Louisville, ordered to repair to this place and report to the Adjutant-General of the Army for orders.

On August 31, I received from the Adjutant-General of the Army an order dated August 24, 1865, mustering me out of the service. As I remained at Keokuk, under the order requiring me to repair there, I respectfully ask whether I am not entitled to commutation of fuel and quarters for the time specified.

I am, General, very respectfully, your obt. servt.,

WM. W. BELKNAP,
Late Bvt. Maj. Gen. Vols.

QUARTERMASTER-GENERAL'S OFFICE,
WASHINGTON, D. C., *June* 9, 1866.

General WM. W. BELKNAP,
Keokuk, Iowa:

SIR: In reply to your letter of the 31st ult., you are respectfully informed that officers "awaiting orders" are not entitled to commutation of fuel and quarters.

Very respectfully, your obedient servant,

By order of Q. M. General.

J. J. DANA,
Colonel, Bt. Brig. Gen.

HEADQUARTERS DEPARTMENT OF MISSOURI,
CHIEF QUARTERMASTER'S OFFICE,
SAINT LOUIS, *December* 4, 1865.

General WM. W. BELKNAP,
Late Bvt.-Maj. Gen. U. S. A., Keokuk, Iowa:

GENERAL: I have received your letter of November 30th, asking whether while at Keokuk, Iowa, on an order to proceed to your place of residence and report thence by letter to the Adjutant-General of the Army, you would be entitled to commutation of fuel and quarters.

The Quartermaster-General has decided that to "enable an officer to draw commutation of fuel and quarters he must be assigned *to some specific duty* at a commutation post."

You are not, therefore, so entitled.

Very respectfully, your obdt. servt.,
L. C. EASTON,
Bvt. Brig. Genl. and C. Q. M.

Respectfully referred to the Adjutant-General, attention being invited to the case of General Rosecrans and others on his files, similar to the case of General Belknap, where the claim for commutation of fuel and quarters was allowed. It is believed an examination will reveal the equity of this claim.

WM. BARNARD.

W. D., *March* 16, '75.

CASE OF COL. STURGIS.

WASHINGTON, D. C., *Nov.* 10, 1868.

To ADJT.-GENL. OF THE ARMY,
Washington, D. C.:

GENERAL: I have the honor to state that I was ordered to Covington, Ky., in July, 1864, by Genl. C. C. Washburn, commanding District of Tennessee, "to await further orders from the War Department," and to request that I may be authorized to commute my fuel & quarters during the period I remained there. This application is based on the hope that it may be allowed me, inasmuch as commutation was authorized to Genl. Rosecrans while awaiting orders in Ohio under similar circumstances, in a special order from the War Dept., issued, I think, in the fall of 1864. My application would have been made earlier but

that I have been for several years separated from the boxes supposed to contain the papers relating to the subject. On receiving and opening those boxes, however, I find that the papers have been mislaid, and I will have to refer altogether to the records of the War Dept. for the necessary data, including even Genl. Washburn's order to me. Trusting that this matter may be laid before the Hon. Secretary of War at as early a day as practicable,

I remain, very respectfully, your obt. servt.,

S. D. STURGIS,
Lt. Col. 6th Cav., Br. Mj. Genl., U. S. A.

ADJUTANT-GENERAL'S OFFICE,
WASHINGTON, *November* 24, 1866.

November 10, 1868, Brevet Brigadier-General S. D. Sturgis, Lieutenant-Colonel 6th Cavalry, states that he was ordered to Covington, Ky., in July, 1864, by General C. C. Washburn, commanding dist. of Tennessee, "to await further orders from the War Department," and requests authority to commute fuel and quarters while at that place. Hopes it m'y be authorized inasmuch as commutation was allowed Genl. Rosecrans while awaiting orders in Ohio, under similar circumstances, which authority was promulgated in special orders from this office in the fall of 1864, and adds that this application would have been made sooner were it not for the mislaying of papers relating thereto, in consequence of which he is obliged to refer the subject to this office, with a view to obtaining the necessary data.

The records of this office show that General Sturgis was relieved from command of cavalry, District of West Tennessee, (commanded by General C. C. Washburn,) by Special Orders 19, District of West Tennessee, May 12, 1864, and ordered to report to General Sherman for orders. By Special Orders 59, May 23, 1864, from General Sherman's headquarters, (Military Division of the Mississippi,) he was ordered to proceed to Memphis, Tennessee, and report to General C. C. Washburn, commanding District of West Tennessee, for duty. By Special Orders No. 52, June 14, 1864, from headquarters District West Tennessee, he was relieved from duty *at his own request*, and ordered to report for orders by telegraph to the Secretary of War.

He relinquished command June 14, 1864, and from July 1, 1864, was awaiting orders at Covington, Ky., until mus-

tered out as brig. general of volunteers August 24, 1865. By Special Orders 466, December 24, 1864, from this office, (based upon inclosed paper 1060, R. 1864,) Major-Gen. W. S. Rosecrans, U. S. Volunteers, was authorized to receive commutation of fuel and quarters in Cincinnati, Ohio, to which place he was ordered by General Orders 294, December 2, 1864, from this office, or to reside at any point in Ohio, he notifying the Adjutant-General of his choice.

ADJUTANT-GENERAL'S OFFICE,
WASHINGTON, *November* 27, 1868.

Respectfully submitted to the Secretary of War.

E. D. TOWNSEND,
A. A. Genl.

Not approved by the Secretary.

E. D. TOWNSEND,
A. A. Genl.

Nov. 27, '68.

ADJUTANT-GENERAL'S OFFICE,
May 24th, 1869.

BREVET MAJOR-GENERAL,
Colonel 7th Cavalry:

By letter from this office of November 28, 1868, (based upon 970, S. 1868, inclosed,) Brevet Major-General S. D. Sturgis, Colonel 7th Cavalry, was informed that his application to be allowed commutation for fuel and quarters while awaiting orders at Covington, Kentucky, in 1864, as brigadier-general of volunteers, had not been favorably considered by the Secretary of War.

May 19th, 1869, General Sturgis again calls attention to his claim, and states the circumstances under which he was ordered to Covington, Kentucky, were peculiar, and (he thinks) not fully apprehended by the War Department. Says after the failure of his campaign in Tennessee, in the spring of 1864, he asked for a court of inquiry to investigate his conduct in that campaign; that while awaiting in Memphis a reply to the application from the honorable Secretary of War, board of officers was assembled at the headquarters of the general commanding to investigate the circumstances attending the failure of the expedition; that the expedients resorted to for securing evidence before this board to injure and defame his character would have been deemed disgraceful in a country in the darkest period of the world's his-

tory; that under these circumstances, and as he was not allowed to appear before the board, (except as a witness,) he felt that to remain in Memphis during its session would place him in a false and injurious position, and he therefore requested authority to leave the city pending the reply of the Secretary of War to the application for a court of inquiry.

Says General Washburn then ordered him to Lexington, Kentucky, to await orders of the War Department, where he remained powerless to vindicate his assailed reputation, and compelled to witness the thousand calumnies put in circulation to destroy him, and quietly settle down unanswered as part of the history of the rebellion; that much as he should rejoice in an opportunity of defending himself before his peers, he does not *now* ask it, knowing as he does the difficulties in the way of its being granted, but the Department still has it in its power to set him right pecuniarily, which he trusts may be done. Adds: Covington, Kentucky, was an expensive place to live in, and he was forced into pecuniary difficulties, from which he has not yet recovered, and he does hope the War Department may feel authorized in granting him the same consideration granted many others similarly situated, and that an order may issue to that effect.

The application of General Sturgis for a court of inquiry, submitted to the Secretary of War by General Halleck, chief of staff, January 18, 1865, with the information that a court could not be assembled at that time without manifest injury to the service, was returned to the Adjutant-General for file, and is inclosed herewith, marked "65, S. 1865."

The proceedings of the board of officers alluded to by General Sturgis are charged upon the books of this office to the late General Bowers, assistant adjutant-general to General Grant.

They cannot be found with the records of this office or with those of the headquarters of the Army.

When this claim was decided adversely, it was upon the ground that General Sturgis was waiting orders at Covington at his own request.

The reason for the request is now explained, and should probably lead to a change in the decision, in view of the action taken upon cases of other officers who were allowed fuel and quarters while waiting orders.

E. D. TOWNSEND, *Adj. Genl.*

HEADQUARTERS OF THE ARMY,
WASHINGTON, D. C., *May* 26, '69.

Respectfully submitted to the Secretary of War, and a fav'able consideration of this old claim invited.

W. T. SHERMAN, *General.*

Approved, and payment ordered.

J. W. RAWLINS,
Secretary of War.

WAR DEPT., *June* 4, '69.

CASE OF GENERAL HEINTZELMAN.

NOVEMBER 22, 1869.

General S. P. HEINTZELMAN, *U. S. Army:*

(Returned.) Requests authority to draw commutation of fuel and quarters as major-general of volunteers whilst awaiting orders at Wheeling, West Virginia, from October 4, 1864, to April 20, 1865, and at Washington, D. C., from May 11, 1865, to August 24, 1865, and as colonel from August 25, 1865, to September 30, 1865, for the time at Washington under verbal orders of the Secretary of War.

Calls attention to the case of General Sturgis, who, he states, was allowed commutation under similar circumstances.

By General Orders No. 263, from this office, September 28, 1864, (copy inclosed,) General Heintzelman was relieved from the command of the Northern Department and directed to repair to Wheeling, West Virginia, report thence by letter to the Adjutant-General, and "await orders." The records of this office show that October 4, 1864, he was at Wheeling awaiting orders, and continued so reporting until detailed on general court-martial, to meet at Wheeling, January 5, 1865, by Special Orders 476, from this office, December 31, 1864. The court was dissolved February 1, 1865, and he was detailed on a general court-martial, to meet at Cairo, Illinois, February 8, 1865, for the trial of General E. A. Paine, from this office, February 1, 1865. March 1, 1865, he was on general court-martial at Paducah, Kentucky. April 1, 1865, was awaiting orders at Wheeling. By Special Orders 171, from this office, April 13, 1865, he was granted 20 days' leave, with permission to visit Washington. May, June, and July he was at Wash-

ington "awaiting orders." The papers relative to the case of General Sturgis, referred to by General Heintzelman, are inclosed herewith, marked (970, S. 1868.)

HEADQUARTERS OF THE ARMY,
WASHINGTON, *Nov. 30th*, '69.

Respectfully submitted to the Secretary of War.
W. T. SHERMAN, *General.*

The within application is not favorably considered.
WM. BELKNAP,
Secretary of War.

WAR DEPARTMENT, *January* 20, 1870.

WASHINGTON, *July 21st*, 1871.

Under Genl. Orders No. 263, War Department, A. G. Office, Washington, Sept. 28, 1864, I was relieved from the command of the Northern Department & ordered to Wheeling, West Virginia, "*& there wait until he receives orders*,"

Under this order I repaired to Wheeling, & from there made application to the War Department to be permitted to await orders at my home in Washington. This was refused, the Secretary stating to my friends that he had duty for me to perform. He wanted me as president of a court-martial. Officers were ordered to Wheeling, & a court was constituted, of which I was president. We were in session about a month, & no case of any kind ever came before us.

This court was dissolved, & I was again detailed on a general court-martial to assemble at Cairo, Ill. We met there; adjourned to Paducah, Ky., and there sat about a month. I was taken sick the day after my arrival, &, after the court adjourned, I got as far as Cincinnati, where I was detained several weeks by my sickness, and finally reached Wheeling. Being still sick, I obtained a short leave to visit my home in Washington. At the expiration of this leave I was permitted, by the Secretary of War, to remain there, & did so till I was ordered to the command of my regiment at Hart Island, N. York Harbor.

I claim commutation, as I was put to the great expense of keeping up two establishments, & compelled to live in Wheeling, the order specifying it therein differing, I be-

lieve, from all others under similar circumstances. Gen. Sturgis was allowed commutation, though his case is not so strong as mine, he being at his home in Covington, Ky.

I have always felt that I was very harshly dealt with at the time I was relieved from my command of the Northern Department.

I claim to have been the means of ferreting out all the ramifications of the society of the "Sons of Liberty," & of three different times forcing the leaders to postpone an attack to release rebel prisoners, of whom I had under my charge some 30,000, & to seize arsenals, & finally compelling them to give up action. I saved Cincinnati from bombardment at the time of Morgan's raid on Covington, Ky., & through the measures I then took gained the ill will of the Governor of Ohio, which finally, I have every reason to believe, led to the loss of my command.

S. P. HEINTZELMAN.

CASE OF COL. CARRINGTON.

COLUMBUS, OHIO, *July* 3, 1869.

Bvt. Maj. Gen. E. D. TOWNSEND,
Adjutant Gen. U. S. Army, Washington, D. C.:

GENERAL: I have the honor, in accordance with the usual precedents, to apply for an order allowing commutation of fuel and quarters while awaiting orders as brigadier-general of volunteers, from the issue of General Order No. 106, Adjutant-General's Office, June 2, 1865, directing me to proceed to my place of residence & report by letter, until issue of G. O. No. 135, August 24, 1865, directing muster out of service as general U. S. Vols., or for a period between receipt of said orders.

Order No. 106 was received June 20, 1865.

Order No. 135 was received August 27, 1865.

I am, General, very respectfully, your ob't servant,

HENRY B. CARRINGTON,
Col., U. S. Army.

July 3, 1869, Colonel H. B. Carrington, U. S. A., in accordance with the usual precedent, applies for commutation of fuel and quarters while awaiting orders as brigadier-general of volunteers, from the issue of General Orders No. 106, Adjutant-General's Office, June 2, 1865, directing him

to proceed to his place of residence and report by letter, until the issue of General Orders No. 135, Adjutant-General's Office, August 24, 1865, mustering him out, or for the period between receipt of orders; states the first order was received June 20, and the last August 27, 1865.

General Carrington was at Indianapolis, commanding draft rendezvous, March 27, 1865, when, by Special Orders No. 147, Adjutant-General's Office, of that date, he was relieved, and ordered to report to General Thomas. April, 1865, he forwarded certificates for 20 days. May 1, 1865, he was in arrest at Indianapolis, ordered to his home to report by letter to the Adjutant-General per Special Orders No. 136, Northern Department, June 19, 1865. By Special Orders No. 387, Adjutant-General's Office, July 31, 1865, he was granted permission to await orders at Wallingsford, Connecticut, for 30 days. He was mustered out, and as brigadier-general of volunteers, by General Orders No. 135, Adjutant-General's Office, August 24, 1865. General Orders No. 106, June 2, 1865, from this office, authorized department commanders to order general and staff officers, whose services could be spared, to their homes, from there to report to the Adjutant-General.

HEADQUARTERS OF THE ARMY,
WASHINGTON, D. C., *July* 8, 1869.

Respectfully submitted to the Secretary of War.

W. T. SHERMAN, *General.*

ADJT. GENL.

The claim of Col. H. B. Carrington, U. S. Army, late brig.-gen. volunteers, for commutation of fuel and quarters while awaiting his muster out of service as brig.-gen. of volunteers.

The claim is contained in a letter from Col. Carrington to the Secretary of War, dated July 3, 1869, and is stated specifically as being for "commutation of fuel and quarters while awaiting orders as brigadier-general of volunteers, from the issue of General Orders No. 106, Adjutant-General's Office, June 2, 1865, directing me to proceed to my place of residence & report by letter, until issue of G. O. No. 135, August 24, 1865, directing my muster out of service as gen. U. S. vols., or for period between receipt of said orders.

"Order No. 106 was received June 20, 1865."

"Order No. 135 was received August 27, 1865."

General Orders No. 106, Adjutant-General's Office, June 2, 1865, referred to by Col. Carrington, authorises department commanders to relieve general and staff officers whose services can be dispensed with, and order them to proceed to their homes, from there to report by letter to the Adjutant-General of the Army.

An indorsement on this claim by the Adjutant-General states that General Carrington was "ordered to his home, to report by letter to the Adjutant-General, per Special Orders No. 136, Northern Department, June 19, 1865. He was mustered out as brigadier-general of volunteers by General Orders No. 135, Adjutant General's Office, August 24, 1865.

REMARKS.—The case of General Carrington is similar to those of hundreds of general and staff officers of volunteers who at the close of the war were ordered to their homes to "report by letter to the Adjutant-General of the Army."

These officers were not on duty, and rendered no service to the Government. The order directing them to proceed to their homes was merely preparatory to their muster out of service.

The regulations of the Quartermaster's Department concerning the payment of commutation to officers, contained in paragraphs 1080, 1082, 1083, and 1086, Revised Army Regulations, certainly do not contemplate the payment of commutation to officers "awaiting orders," nor have any orders issued since the regulations were published authorized such payment.

General Carrington has by his own statement received pay from the Government from June 20, 1865, to August 27, 1865, during which period he rendered no service as an equivalent.

It is believed that the Government, in continuing General Carrington on pay for so long a period after the close of the war, when his services were no longer needed, has acted with sufficient liberality toward him.

It is respectfully recommended that the claim be rejected.

WAGER SWAYNE,
Col., Bvt. Maj.-Genl. U. S. A.

Approved.

JOHN A. RAWLINS,
Secretary of War.

WAR DEPT., *Aug. 2d*, 1869.

[Special orders No. 105.]

HEADQUARTERS DEPARTMENT OF TEXAS,
(TEXAS AND LOUISIANA,)
AUSTIN, TEXAS, *September* 5, 1870.

[Extract.]

* * * * * *

II. Pursuant to telegraphic instructions from the War Department of this date, Major Brantz Mayer, paymaster U. S. army, is relieved from duty in this Department, and will repair to Baltimore, Maryland, and report thence by letter to the Adjutant-General of the army and await further orders.

* * * * * *

By command of Colonel J. J. Reynolds.

(Signed,) H. CLAY WOOD,
Assistant Adjutant-General.

Official:

(Signed,) H. CLAY WOOD,
Asst. Adj.-General.

True copy of original sent to me at New Orleans.

BRANTZ MAYER,
P. M., U. S. A.

BALTIMORE, *October* 19*th*, 1870.

General B. W. BRICE,
P. G., U. S. A., at Washington:

GENERAL: I respectfully submit the inclosures for your consideration. The regimental q'rmaster of the 4th Artillery, (Lt. Bancroft,) act. for quartermaster at this post, gave me fuel, quarters, &c., for September without hesitation; but he has been succeeded by Capt. Alligood, military storekeep'r, U. S. A., as act. ast. quartermaster here, who declines supplying me.

The accompanying decision of the Attorney-General seems to cover the points involved in the case; yet, if there be reasonable doubt, I respectfully request that the question may be decided by the proper authority at Washington.

I am, General, most respectfully, your most obt. servant,

BRANTZ MAYER,
Paymaster, U. S. A.

Respectfully forwarded to the Adjt. General. I take occasion to suggest that it is desirable for the War Department to announce a general rule to govern in these cases.

In former times it was held & understood that "fuel and quarters" was strictly a *duty* allowance, only accruing to an officer whilst actually on duty. "Awaiting orders" was not regarded duty in the sense of the rule. Rare exceptional cases, however, did and may occur, as where an officer, from no application of his own, or for no benefit to himself, is taken from duty and directed to await orders.

In such case, the position not being of his own or his friends' seeking, but forced upon him for some purpose of the Government authorities, it would seem to be just & proper to continue to him the allowance. But this should only be done by special authority in the case.

If the Secretary of War concurs in the foregoing, should not the rule be announced in authoritative form? It will set at rest expectations and avoid importunities which have grown out of a loose practice on the subject of late years.

B. W. BRICE.

P. M. G. O., *Oct.* 21, '70.

WAR DEPT., ADJT.-GENLS. OFFICE,
WASHINGTON, *October* 28, 1870.

Major Mayer was awaiting orders for his own convenience.

The Secretary considers him not entitled to fuel & quarters.

Noted.

E. D. TOWNSEND,
Adjt. Genl.

WAR DEPARTMENT,
WASHINGTON CITY, *October* 20, 1876.

SIR: In compliance with your request of the 16th instant, I have the honor to inclose a list of the names of all

officers who, at their own request, were transferred to the list of unassigned officers, under section 2 of the act of Congress of March 3, 1869, and were ordered home to await orders.

Very respectfully, your obedient servant,

H. T. CROSBY,
Chief Clerk,
For the Secretary of War, in his absence.

The honorable the ATTORNEY-GENERAL.

[Here follows a list of one hundred and twenty-nine officers who were ordered home to await orders.

REPORT OF THE TREASURY DEPARTMENT.

TREASURY DEPARTMENT.

Be it remembered that C. C. Carpenter, esq., who certified the annexed transcripts, is now, and was at the time of doing so, Second Comptroller of the Treasury, and that full faith and credit are due to his official attestations.

In testimony whereof, I, Lot M. Morrill, Secretary of the Treasury of the United States, have hereunto subscribed my name, and caused to be affixed the seal of this Department, at the city of Washington, this 17th day of November, in the year of our Lord 1876.

[SEAL.]

LOT M. MORRILL,
Secretary of the Treasury.

Copy Comp'r's Digest, (p. 1783.)

NOV'R 14th, 1851.

Hon. C. M. CONRAD,
Sec'y of War.

SIR: In accordance with your request, expressed in a conversation which I had the honor to have with you a

few days since, relative to the claim of Maj. Wm. H. Chase, Corps of Engineers, I subjoin a statement of the facts connected with that claim and the question thereby presented. During the years 1838 and 1839, Maj'r Chase was the officer in charge of works at Pensacola, Florida, and, in connection therewith, at other places on the Gulf, and during those years charged for and received commutation of fuel and quarters at Pensacola, and also an extra per diem allowed under a then existing regulation of the War Dep't to officers superintending more than one work at the same time, to cover the additional expenses for fuel and quarters thereby incurred.

In 1842 it was discovered at the Treasury Dep't for the first time, that during 325 days of the above-named period, namely, from the 27th of April to the 25th of Sept., 1838, and from the 10th of April to the 29th of Sept., 1839, Maj'r Chase was in Europe, on leave of absence granted by the War Dep't.

The amount received by him during those absences for commutation of fuel and quarters, and for extra allowance for fuel and quarters, amounting to $812, was therefore immediately charged to him by the accounting officers.

Maj'r Chase now claims, through his attorney, Mr. Burgess, (who was the clerk who first discovered the error and caused the charge to be made,) that the amount thus disallowed nine years ago by the accounting officers should now be allowed and placed to his credit.

Upon this question I have only to say that the allowance would be contrary to law and to the existing regulations, and at variance with the uniform practice of the accounting officers and the War Dep't on this subject. No such allowance has ever been made to an officer when on leave of absence, nor even when absent from his post on other duty, if such absence exceeds thirty days.

And to admit Maj'r Chase's claim would be to unsettle the accounts of almost every officer in the army, all of whom would of course be equally entitled to those allowances for all the time that they may have been hitherto absent on leave. The General Regulations authorizing payment of commutation for fuel and quarters are 976 and 982, and 76 of Engineer Regulations, which are evidently intended to restrict it to the time when the officer is actually at his post, except when temporarily absent on duty, and do not treat it as an emolument. Such is the construction they received from Secretary Cass, Spencer, and

Marcy, and by former as well as the present accounting officers; and the practice has always conformed to this construction.

Still less can Maj'r Chase be regarded as entitled to the extra per diem allowed by Engineer Regulations 77 to meet the expenses of fuel and quarters at the additional posts at which his presence was from time to time requisite. That allowance was not intended as an emolument, but to cover actual expenses, and could in no view be extended to a period of six months' absence on leave. The papers transmitted herewith show the history of that regulation and the construction given to it by Secretaries who made and administered it.

Among them will be found a decision of Mr. Spencer, restricting this allowance to the time during which the officer was actually present at the additional posts, not exceeding half the whole time, and a certificate of this time was required; and the same decision was also made by Mr. Sec'y Porter in 1843.

I presume that it was never intended by the Sec'y of War to sanction so serious a change in existing regulations, especially as applied to past services and accounts heretofore settled. And indeed I learned, in the conversation above alluded to, that this question was not brought to your personal notice in connection with Maj'r Chase's claim.

I therefore respectfully refer it, with the accompanying papers, feeling confident that you will concur in the opinion of the Third Auditor and myself, as well as that of the accounting officers who passed upon the question in 1842, that the allowance should not be made.

I am, sir, &c.,

E. J. PHELPS,
Compt.

Comp'r's Digest, (*p.* 1794.)

JAN'Y 30, 1852.

Maj'r A. A. NICHOLSON,
Quarterm'r M. Corps, Headquarters.

SIR: Claims having recently been presented by the officers of the Marine Corps, for transportation and for fuel and quarters when on leave of absence, to the accounting officers, without at the same time, presenting the facts ne-

cessary to a proper understanding of such claims, to supply such defect in future, the following regulations will be observed:

All officers of the Marine Corps claiming fuel and quarters will certify upon their accounts as follows:

I certify on honor that I have not been on leave of absence or waiting orders any part of the time charged in this account; that I have not drawn fuel or quarters in kind, nor received a commutation therefor, for any part of the said time; and that I am not in arrears to the United States on any account whatever; agreeably to form marked No. 1, enclosed herewith. * * * *

Officers on leave of absence or waiting orders are not entitled to fuel or quarters. An officer to be entitled to these allowances must be assigned to some specific duty at the place where he claims them, and must make his requisition upon the quartermaster for them. An officer who receives his quarters in kind must draw his fuel in kind also.

It is not allowable in the Army for an officer who is accommodated in the public quarters, but who, from a deficiency of public quarters cannot be accommodated with his full complement of rooms, to commute for private quarters.

Fuel and quarters are not an emolument of office, but for the necessary accommodation and comfort of the officer. If, for example, a lieutenant who is by the Regulations entitled to two rooms, receive one room in the public quarters, he will not be allowed commutation for the other unless actually occupied by him, and then he will draw his fuel in kind, because he occupies public quarters.

I am, sir, &c.,

E. J. PHELPS,
Compt.

Copy Comp'r's Digest, (p. 1788.)

OCTOBER 14*th*, 1853.

F. BURT, Esq.,
3d Auditor.

SIR: I have received your letter of the 11th instant, transmitting your report of May 23, 1853, in reference to items suspended in the accounts of Lt. Col. Long, with a

decision of the Secretary of War indorsed upon the report.

The items allowed by the Secretary will be passed to the credit of Colo. Long, & charged to the appropriations, as indicated in the decision.

In relation to charges of a similar kind for quarters & fuel, &c., arising under the river and harbor act approved Aug. 30, 1852, I have had a full conversation with the Secretary of War. He considers his decision of Sept. 28, 1853, as applicable also to them, and stated in substance that the allowance for quarters and fuel not being, like pay and subsistence, an absolute right, pertaining under all circumstances to the officer's rank, but depending on certain conditions of duty and service, and the employment upon civil works not being a military duty, although one in which quarters and fuel were obviously necessary, he considered the allowances therefor as properly chargeable, not upon a military appropriation, but upon the several appropriations for the civil works on which the officers might be engaged.

The act of Aug. 31, 1852, having directed the appropriations made in that act "to be expended under the superintendence of the Secretary of War," the accounts will be settled in conformity with this decision.

The report is herewith returned.

I am, &c., &c.

J. M. B.

Copy Comp'r's Digest, (*p.* 1803.)

MARCH 9, 1854.

Major A. A. NICHOLSON,
Q'rm'r Marine Corps, Headquarters.

SIR: Your letter of yesterday, submitting the claim of Brevet Major Ward Marston, of the Marine Corps, "for commutation of quarters & fuel while awaiting orders at Bristol, R. I., for decision," has been received.

The claim is for commutation of quarters and fuel for himself and servant at Bristol, R. Island, from 11th November, 1853, to the 31st March, 1854, four months and twenty days, at $8 per month for each room to which he claims to have been entitled, and at $8 per cord for wood, amounting in all to the sum of $231.09.

It appears by a copy of the order of the commandant of the Marine Corps, approved by the Secretary of the Navy, dated October 24th, 1853, filed with the account, and under which he claims the commutation, that Major Marston was relieved from duty at the marine barracks at Portsmouth, N. H., and was ordered to proceed to Boston and await there, or in the vicinity, further orders.

This order did not place him on duty at Bristol, R. Island, or anywhere else; but, on the contrary, expressly relieved him from duty at the marine barracks, Portsmouth, N. H., and directed him to await further orders in Boston or vicinity. It is evident, therefore, that he was not under orders for any particular duty.

It is a wel-lsettled principle that an officer of the Army or Marine Corps, to be entitled to fuel and quarters, must be assigned to some specific duty at the place where he claims them, and must make his requisition on the quartermaster for them, agreeably to par. 965, General Regulations for the Army, published in 1841, and must certify on honor that he has not been on leave of absence or awaiting orders any part of the time charged in his account, &c.

The principle involved in this case has been so often affirmed by this office and the War Department that any further exposition of it is unnecessary at this time.

The claim cannot, therefore, be allowed.

I am, sir, &c.,

J. M. B.

T. P.

Copy Comp'r's Digest, (p. 1803.)

DECR. 5th, 1854.

Capt. N. C. MACRAE,
Fort Union, N. Mex'o.

SIR: I return herewith the vouchers which accompanied your letter of the 24th Octo. last, (received yesterday,) respecting your claim for commutation of fuel and quarters while waiting orders in 1852 and 1853.

I have carefully examined the subject, and am satisfied that there is no law nor regulation that would justify the allowance. Par. 965 of the Army Regulations, which you suppose to be inapplicable, has always, so far as I know, been applied in such cases, and is, I believe, legitimately in

point. The officer entitled to fuel and quarters must, under that regulation, make a written requisition for them upon the quartermaster, accompanied by a copy of the order placing him on duty. You present no vouchers showing a compliance with these conditions. But, independently of this regulation, "leave of absence" and "waiting orders" have long been considered equivalent and convertible terms, so far as they affect the right of an officer to fuel and quarters; and in the Navy, the law of 1835 regulating the pay of officers uses both terms in the same sense, no increase of pay being allowed under preparatory orders. Express decisions upon this question have repeatedly been made by the Treasury Department in cases submitted by officers of the Army, one of which is printed in the Digest of Decisions of the 2d Comptroller's Office, par. 207, and is in these words: "Officers on leave of absence or waiting orders are not entitled to fuel and quarters." And in the manuscript decision it is added: "An officer to be entitled to these allowances must be assigned to some specific duty at the place where he claims them."

I have no knowledge of the cases of Lieut. Lay and Paymaster Hunter, to which you refer as precedents. It is possible that, by inadvertence on the part of the examining clerks, they may have received improper credits; but an illegal allowance does not become less objectionable by repetition, nor of any force as a precedent. I shall inquire into the facts of these two cases; and if they are, as you suppose, analogous to yours, directions will be given to charge these officers with the sums they have illegally received.

I am, &c.,

J. M. B.

Copy Comp'r's Digest, (p. 1790.)

TREASURY DEPARTMENT,
SECOND COMPTROLLER'S OFFICE,
Dec. 21, 1855.

SIR: I have received your letter of the 13th instant, in relation to a commutation of fuel and quarters received by you while "waiting orders," and which has been disallowed in the settlement of Lieut. Gorga's account.

You desire to know the reasons for the disallowance, and argue that an officer waiting orders by direction of competent authority is entitled to the commutation. This precise point has arisen and been decided in many cases entirely analogous to yours. The long-standing rule of the Quartermaster's Department and the accounting officers upon the subject is, "To be entitled to fuel and quarters, or commutation thereof, an officer must be assigned to some specific duty at the place where he claims them, and must make his requisition on the quartermaster for them."

In the case of an officer ordered by his commander to proceed to Baltimore and await orders for the recruiting service, which orders he did not receive, it was held that he was not entitled to fuel and quarters, and the decision was confirmed by the War Department.

The disallowance in your case was made in compliance with a general and obligatory rule, which has been applied in every similar instance, unless an erroneous allowance of the commutation has inadvertently escaped the notice of the accounting officers.

I am, &c., J. M. BRODHEAD.

Capt. JESSE L. RENO, *A. A. Q. M.*,
Frankfort Arsenal, Bridesburg, Pa.

Copy Comp'r's Digest, (p. 1807.)

TREASURY DEPARTMENT,
SECOND COMPTROLLER'S OFFICE, *June 21st*, 1859.

A. J. O'BANNON, Esq., *Fourth Auditor.*

SIR: I return herewith the letter of Major H. B. Tyler, of the Marine Corps, which accompanied yours of yesterday. It is difficult to decide upon suppositious cases generally, and I can only say that a positive regulation must be found making any allowance to any officer before it is admissible. In general terms an officer must be assigned to some specific duty at the post where he claims to be entitled to quarters and fuel. On his arrival at his station he must make his requisition on the quartermaster for his quarters and fuel, accompanied by a copy of the order putting him on duty at the station; and it is only when, after such requisition, public quarters and fuel cannot be furnished, he becomes entitled to a money allowance in lieu thereof, provided he is on duty without troops.

Very respectfully, &c., J. M. CUTTS.

Copy Compt'r's Digest, (*p.* 1790.)

TREASURY DEPARTMENT,
SECOND COMPTROLLER'S OFFICE,
Nov. 23, 1864.

SIR: Your letter of the 14th inst. has been received, and contents duly considered.

You claim commutation of fuel & quarters on the ground that substantially you are on duty at Nashville, Tenn., under an order from Washington, a copy of which you furnish, as follows:

WASHINGTON, *Sept.* 21, 1864.

"1. Major Oliver D. Greene, assistant adjutant-general U. S. Army, is hereby relieved from duty in the Department of Missouri. He will at once report to Nashville, Tenn., and from thence report, by letter, to the Adjutant-General of the Army for orders."

That order is indorsed: "This order does not entitle Maj. Greene to fuel & quarters. It does not station him in Nashville, nor is he in performance of any duty," from which decision you appeal to this office.

I have to say in reply that the decision of the paymaster appears to be correct, being in conformity with precedents in analogous cases.

The following is a copy of a decision made in this office on the 21st of Dec., 1855, in a similar case:

* * * "You desire to know the reasons for the disallowance, and argue that an officer waiting orders by direction of competent authority is entitled to the commutation.

"This precise point has arisen and been decided in many cases entirely analogous to yours.

"The long-standing rule of the Q'rmaster's Department and the accounting officers upon the subject is, 'To be entitled to fuel & quarters, or commutation thereof, an officer must be assigned to some specific duty at the place where he claims them, and must make his requisition on the quartermaster for them.'

"In the case of an officer ordered by his commander to proceed to Baltimore and await orders for the recruiting service, which orders he did not receive, it was held that he was not entitled to fuel & quarters, and the decision was confirmed by the War Department.

"The disallowance in your case was made in compliance

with a general & obligatory rule, which has been applied in every similar instance, unless an erroneous allowance of the commutation has inadvertently escaped the notice of the accounting officers."

J. M. BRODHEAD,
Comptroller.

Maj. O. D. GREENE,
Asst. Adj. Gen., Nashville, Tenn.

TREASURY DEPARTMENNT,
SECOND COMPTROLLER'S,
November 16th, 1876.

I certify the foregoing to be true copies of the original records of this office.

C. C. CARPENTER,
Comptroller.

Copy Comp'r's Digest, (p. 1804.)

NOVEMBER 18, 1867.

In 1862, when General Frémont was relieved of the command of the Mountain Department, and ordered to New York to await further orders, a portion of his staff were permitted to accompany him. Among them was Col. Albert Tracy, A. D. C., who, on his arrival in New York, was ordered by Gen. Frémont on duty—such as answering letters, making out reports in regard to the Mountain Department, &c.

His claim for commutation of fuel and quarters while on such duty was indorsed by the Comptroller as follows: It has been repeatedly decided, both by the accounting-officers and the War Department, that to be entitled to commutation of fuel and quarters, under the regulations, an officer must be assigned to some specific duty at the place where he claims it, and must have made requisition on the quartermaster there for them in kind. No such requisition was made in this case, nor in my opinion was the assignment to duty such as the regulations and rulings contemplate. The staff (undetached) of a general follows the fortunes of the general. If he is on duty, they are on duty. If he is awaiting orders, they are awaiting orders.

Gen. Frémont, having no duties under his command, was not competent to assign Col. Tracy to any specific duty; and had the former been ordered to the field, the latter

would have followed without any special order relieving him from the duty to which Gen. Frémont had assigned him. That duty was just such as every officer awaiting orders is required to perform. Indeed Col. Tracy seems to admit that his status was that of an officer waiting orders, for all the decisions he cites as pertinent to his case were made on claims of officers of that status.

All the cases in which commutation of fuel and quarters have been allowed to officers awaiting orders have been considered special, requiring a particular order of the War Department. The regulations alone do not authorize the payment of such claims. In January, 1856, it was held by this office that "the allowance for fuel & quarters not being determined by statute, but within the control of the War Department, the accounting officers cannot go beyond the Army Regulations when they apply, nor provide for a *causus omissus.*"

The question of the right of an officer to an allowance for fuel and quarters exceeding that authorized by the regulations can be adjusted only by the Secretary of War, whose decision in this matter governs as the law in the case.

J. M. BRODHEAD,
Comptroller.

SAM'L B. PARIS, Esq'r,
Washington, D. C.

TREASURY DEPARTMENT,
SECOND COMPTROLLER'S OFFICE,
November 16th, 1876.

I certify the foregoing to be true copies of the original record of this office.

C. C. CARPENTER,
Comptroller.

II.

A large number of the officers ordered home to await orders in pursuance and by reason of consolidations of regiments under the same act of March 3, 1869, and numbering about seventy officers, reported from various places while so awaiting orders, from two to six different places each, which will appear by a few of the many such reports of the War Department in evidence and proved, which are here inserted as samples of all, to wit,

WAR DEPARTMENT, ADJUTANT-GENERAL'S OFFICE,
WASHINGTON, *August* 9, 1875.

Official statement, compiled from the records of the Adjutant-General's Office, of the military history of Wharton White, late first lieutenant Twentieth United States Infantry, from February 23, 1869, to December 1, 1870, furnished on the application of the United States Court of Claims.

In the consolidation of the infantry regiments of the United States Army, as directed by section 2 of the act of Congress of March 3, 1869, the regimental organization of the Twentieth Infantry remained unchanged. The above-named officer left his post, Alexandria, La., February 23, 1869, on leave of absence for twenty days, which was extended twenty days, and expired April 4, 1869. He did not rejoin his post or regiment, but reported from Philadelphia, Pa., until, by Special Orders No. 109, May 7, 1869, from this office, he was, at his own request, ordered home to await orders. By Special Orders No. 124, May 22, 1869, from this office, he was detailed for registering duty in the First Military District, on which he continued until July 25, 1869, when he was relieved in accordance with Special Orders No. 173, July 19, 1869, from this office, and ordered home to await orders. He reported as awaiting orders as follows: August 31, 1869, to May 31, 1870, from Philadelphia, Pa.; June 30 and July 31, 1870, from Concordville, Pa.; and August 31 to October 31, 1870, from Philadelphia, Pa. He was discharged the service at his own request, to date December 1, 1870, by Special Orders No. 343, December 5, 1870, from this office.

E. D. TOWNSEND,
Adjutant-General.

WAR DEPARTMENT, ADJUTANT-GENERAL'S OFFICE,
WASHINGTON, *January* 13, 1876.

Official statement, compiled from the records of the Adjutant-General's Office, of the military history of John J. Clague, late second lieutenant Fortieth United States Infantry, from April 12, 1869, to August 3, 1870, furnished on the application of the United States Court of Claims.

In the consolidation of the Thirty-ninth and Fortieth Regiments United States Infantry, authorized by section

2 of the act of Congress of March 3, 1869, and announced in General Orders No. 25, Headquarters Department of Louisiana, April 12, 1869, the above-named officer was left out and ordered home to await orders.

He left his post, New Orleans, La., in April, 1869, (exact date not reported,) and subsequently reported as awaiting orders as follows: April 30, 1869, to June 30, 1869, at Saint Paul, Minn.; July 31, 1869, to December 31, 1869, at Castle Rock, Minn.; January 31, 1870, to April 30, 1870, at Minneapolis, Minn.; and May 31, 1870, to July 31, 1870, at Castle Rock, Minn. He was assigned to the Twelfth Infantry by General Orders No. 103, August 3, 1870, from this office.

THOMAS M. VINCENT,
Assistant Adjutant-General.

WAR DEPARTMENT, ADJUTANT-GENERAL'S OFFICE,
WASHINGTON, *August* 4, 1875.

Official statement, compiled from the records of the Adjutant-General's Office, of the military history of Gordon Granger, late colonel Twenty-fifth United States Infantry, from March 15, 1869, to December 15, 1870, furnished on the application of the United States Court of Claims.

In the consolidation of the infantry regiments of the United States Army, as directed by section 2 of the act of Congress of March 3, 1869, the above-named officer was left out, and by Special Orders No. 62, Headquarters Department of the Cumberland, April 3, 1869, was ordered to his home to await orders. He reported as awaiting orders from Memphis, Tenn., April 7 to April 30, 1869; Hot Springs, Ark., May 30, 1869; Evansville, Ind., June 30 and July 31, 1869; Saratoga, N. Y., August 8, 1869; New York City, September 15, 1869, to June 30, 1870, and Lexington, Ky., July 31 to October 31, 1870. By General Orders No. 126, December 15, 1870, from this office, he was assigned to the Fifteenth Infantry.

THOMAS M. VINCENT,
Assistant Adjutant-General.

WAR DEPARTMENT, ADJUTANT-GENERAL'S OFFICE,
WASHINGTON, *January* 10, 1876.

Official statement, compiled from the records of the Adjutant General's Office, of the military history of Joseph B. Collins, late major Second United States Infantry, from March 15, 1869, to January 1, 1871, furnished on the application of the United States Court of Claims.

In the consolidation of the infantry regiments of the United States Army, (authorized by section 2 of the act of Congress of March 3, 1869,) the above-mentioned officer was, by General Orders No. 17, March 15, 1869, from this office, left out, and by Special Orders No. 62, Headquarters Department of the Cumberland, April 3, 1869, was ordered home to await orders.

He left his post, Louisville, Ky., in April, 1869, (exact date not reported,) and from April 30, 1869, to November 30, 1869, reported as awaiting orders at Green Bay, Wis. He subsequently reported as follows: From December 31, 1869, to March 31, 1870, at Horicon, Wis.; April 30, 1870, at Winchester, Va.; May 31, 1870, at Bethlehem, Pa.; and June 30, 1870, to December 31, 1870, at Circleville, Ohio. He was honorably mustered out of service by General Orders No 1, January 2, 1871, from this office.

THOMAS M. VINCENT,
Assistant Adjutant-General.

WAR DEPARTMENT, ADJUTANT-GENERAL'S OFFICE,
WASHINGTON, *October* 10, 1876.

Official statement, compiled from the records of the Adjutant-General's Office, of the military history of Seth Bonney, captain Twenty-seventh United States Infantry, from June 14, 1869, to January 2, 1871, furnished the Department of Justice, in compliance with the request of the Attorney-General dated June 21, 1876.

Under section 2 of the act of Congress of March 3, 1869, the above-named officer was rendered supernumerary June 14, 1869, but remained on duty until January 27, 1870, when he was ordered from St. Louis, Mo., to his home, Sterling, Mass., to await orders. He subsequently reported as awaiting orders as follows: January 31 to March 31, 1870, at Sterling, Mass.; April 30, 1870, at Byron, Me.; May 31 and June 30, 1870, at Sterling, Mass.; July 30,

1870, at Byron, Me.; August 31 to November 30, 1870, at Dixfield, Me., and December 31, 1870, at Sterling, Mass. By orders of January 2, 1871, from this office, he was assigned to the Thirteenth Infantry.

THOMAS M. VINCENT,
Assistant Adjutant-General.

III.

So far as appeared in evidence in this case none of these many officers so as aforesaid reporting from different places asked or obtained permission to so change their locations, nor was any objection ever made to their having done so.

IV.

Some 40 to 50 orders involving material changes, modifications, and alterations of the Army Regulations in force July 28, 1866, have been issued by the Secretary of War since that date from time to time, which are not inserted here, as it would make the record so voluminous, but *were* proved.

One of these alterations increased the price of commutations of rooms from $9 to $18 each room. Another increased the price of fuel.

United States Supreme Court.

OCTOBER TERM, 1876.

THE UNITED STATES, APPELLANTS,

vs.

EDWARD B. RHEEM, APPELLEE.

No. 962.

THE UNITED STATES, APPELLANTS,

vs.

FREDERICK M. LYNDE, APPELLEE.

No. 963.

THE UNITED STATES, APPELLANTS,

vs.

FREDERICK PHISTERER, APPELLEE.

No. 964.

APPEALS FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLEES.

HALBERT E. PAINE,
BENJAMIN F. GRAFTON,
Attorneys for Appellees

McGILL & WITHEROW, Printers, 1107 E Street, Washington, D. C.

United States Supreme Court.

OCTOBER TERM, 1876.

THE UNITED STATES, Appellants, *vs.* EDWARD B. RHEEM, Appellee.	No. 962.
THE UNITED STATES, Appellants, *vs.* FREDERICK M. LYNDE, Appellee.	No. 963.
THE UNITED STATES, Appellants, *vs.* FREDERICK PHISTERER, Appellee.	No. 964.

APPEALS FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLEES.

STATEMENT OF FACTS.

The facts of each case are accurately and succinctly stated in the findings of the court of claims, set forth in the record.

ARGUMENT.

The appellee's brief, in the similar case of The United States *v.* George W. Chilson, No. 961, is submitted as a part of the appellees' brief in the cases at bar.

But the assistant attorney general deemed it his duty to insist, as a condition to the submission of these causes under rule 20 at the present term, that certain decisions of the war and treasury departments, and certain orders issued by the war department, changing or affecting the army regulations, and also the acts of certain officers awaiting orders (all of which the court of claims declined to embrace in their findings) should be brought to the notice of this court. The appellees accordingly consented to regard these decisions, acts, and orders as stipulated facts in the record; and it becomes necessary to consider what bearing they have upon the legal questions involved in the cases at bar.

I.

These decisions of the war and treasury departments will be considered together. Our objection to them is that they are not ultimate facts in these cases; that they are not even subordinate facts which can, either as elements or as evidence, enter into or affect the ultimate facts of the cases, but are merely arguments to show that because certain executive officers have given a particular construction to the statutory provisions in question, therefore this court ought to adopt the same construction, and that, as arguments, they are altogether unsatisfactory and unsound.

The decisions of the war department, presented by the assistant attorney general as a rule of decision for this court in the interpretation of the law relating to commutations of fuel and quarters in cases of officers awaiting orders, are *eight* in number. In *five* of them, made respectively by Charles Thomas, acting quartermaster gen-

eral, Colonel J. J. Dana, W. W. Belknap, secretary of war, and J. A. Rawlins, secretary of war, these commutations were *withheld* from officers awaiting orders. In *three* of them such commutations were *allowed;* and of these three one was decided by the President, secretary of war, and attorney general, and the other two were decided respectively by E. M. Stanton, secretary of war, and J. A. Rawlins, secretary of war.

In order to appreciate the bearing of these decisions upon the question under consideration, it becomes necessary to recur to the constitutional and statutory provisions under which they were made. It is provided in the second section of the eighth article of the constitution that "the Congress shall have power to raise and support armies," and "to make rules for the government and regulation of the land and naval forces." It is provided in the second section of the second article that "the President shall be commander-in-chief of the army and navy of the United States." The distinction between the powers conferred by these provisions upon Congress and the President respectively is the same which is preserved everywhere in the constitution between the powers conferred upon the legislative and those conferred upon executive departments of the government. It is the fundamental distinction between powers which are in their nature legislative and those which are in their nature executive. All legislative authority over the army is conferred upon Congress. All executive or administrative authority is granted to the President. The President may, *by virtue of his constitutional powers, without statutory authority, and even in the face of statutory inhibition,* make or alter any army regulations, which are purely *executive or administrative* in their nature.

But regulations which are *legislative* in character can only be made by *Congress* or by the *authority of Congress.* While there may be cases lying near the boundary line between the two classes of powers, involving in their accurate practical classification no little difficulty, the regulation of the compensation of the army is not one of those cases. It

falls as clearly within the scope of the authority conferred upon Congress as does the actual command of an army in battle within the scope of executive authority; and it falls as far from the line of separation in one direction as the command of troops on the field does in the opposite direction. The doctrine of the Supreme Court in Williamson's case, (23 Wall., 411,) is that "the regulation of the *compensation of the officers of the army* belongs to the *legislative department* of the government." And here originates the fatal fallacy which invalidates all the arguments of the appellants on this subject. They confound together in one indiscriminate mass all the regulations of the army, whether *executive* or *legislative* in character, and fail to see that while the President *can*, without legislative authority, make and alter the *former*, he *cannot*, without such authority, make or alter the *latter*. They are blind to the difference between a regulation prescribing the compensation of officers of the army and a regulation prescribing the duties of a regimental adjutant at guard-mounting or dress-parade. The power of the President to make regulations like the latter, of an executive or administrative character, *has never been denied*, but has *always been asserted by the appellees.*

That commutations of fuel and quarters are a part of the *compensation* of the officer is very clear. In 1869 the compensation of a colonel of infantry (for example) serving in the field was, for a month of 30 days, $227, made up as follows: pay proper, $110; commutation of six rations per day, $54; commutation of servant's pay, $32; commutation of servant's clothing, $13; commutation of servant's rations, $18. It was compensation *so made up* which this court in Williamson's case adjudged the officer awaiting orders entitled to receive *in full.* Can it be claimed that commutations of quarters or fuel are any less a part of his compensation, at a station without troops, than commutations of his own rations, or of his servant's rations, or of his servant's clothing? Is the stipulated fuel and house-use of the farm laborer or mill operative any less

a part of his *compensation* than his board or his cash stipend? If the regulation of commutations of servant's clothing and rations is a legislative function, so also is the regulation of commutations of quarters and fuel. The circumstance that fuel, furnished to the officer in kind, is public property, and, if not used, reverts to the United States, has no more efficacy to transform an allowance of fuel, either in kind or in commutation, from a subject of legislative into one of executive cognizance, from *compensation* into *something else*, than has the circumstance that fuel, not consumed by the farm laborer, reverts to the farmer, efficacy to transform the stipulated allowance of fuel from *compensation* into *something else*. The executive department has no more *constitutional* power to determine how much *public property* shall be furnished to the officer, as a part of his compensation or for his use, than to determine how much *money* shall be so furnished. It has no more *constitutional* right to determine how much money compensation shall be allowed an officer, in the form of commutations of rations or clothing for his servant, than in the form of commutations of fuel and quarters for himself. The fact that, in common parlance, there is a distinction between pay proper and commutations of fuel and quarters is wholly immaterial. Indeed there is precisely the same distinction between pay proper and commutations of rations and of servant's rations and clothing, which in 1869 constituted more than half of the regular money compensation of the officer in the field. The obvious truth is that all of these allowances, when the state of facts on which by law they respectively become due exists, enter as elements into the compensation of the officer.

The following is the legislation bearing upon the question:

"SEC. 9. * * And that the regulations in force before the reduction of the army be recognized, so far as the same shall be found applicable to the service, subject, however, to such alterations as the secretary of war may adopt with the approbation of the President." (Act of April 24, 1816.)

"SEC. 37. *And be it further enacted*, That the secretary of war be and he is hereby directed to have prepared, and to report to Congress at its next session, a code of regulations for the government of the army and of the militia in actual service, which shall embrace all necessary orders and forms of a general character for the performance of all duties incumbent on officers and men in the military service, including rules for the government of courts-martial. The existing regulations to remain in force until Congress shall have acted on said report.

SEC. 38. *And be it further enacted*, That all laws and parts of laws inconsistent with the provisions of this act be, and the same are hereby, repealed." (Act of July 28, 1866.)

The new regulations not having been reported to Congress by the secretary of war, it was provided, in the act making appropriations for the army, as follows, viz:

"SEC. 20. *And be it further enacted*, That the secretary of war shall prepare a system of general regulations for the administration of the affairs of the army, which, when approved by Congress, shall be in force and obeyed until altered or revoked by the same authority; and said regulations shall be reported to Congress at its next session; provided that said regulations shall not be inconsistent with the laws of the United States." (Act of July 15, 1870.)

"*Be it enacted, &c.*, That so much of section 20 of the act approved July 15, 1870, entitled 'An act making appropriations for the support of the army for the year ending June 30, 1871, and for other porposes,' as requires the system of general regulations for the army therein authorized to be reported to Congress at its next session, and approved by that body, be and the same is hereby repealed; and the President is hereby authorized, under said section, to make and publish regulations for the government of the army, in accordance with existing laws." (Act of March 1, 1875.)

So far as those executive or administrative orders (whether styled army regulations or not) which the President, as the commander in chief of the army, has constitutional authority to make, are concerned, it is clear that these statutes had no effect to validate or invalidate *them*. But as to provisions for commutation of fuel and quarters

and others like them, legislative in their nature, they had the effect to keep the regulations of 1863 in force from July 28, 1866, until March 1, 1875. And on March 1, 1875, the President was authorized "under said section (20, Act July 15, 1870) to make and publish regulations for the government of the army, in accordance with existing laws." If the effect of this last act was to empower the President to make regulations, not only in matters of purely *executive* cognizance, but also on such subjects of legislation as the compensation of the army, then, since March 1, 1875, the regulations of 1863 respecting commutation of fuel and quarters have been subject to modification by the President. But the cause of action in each of these cases accrued in 1869 and 1870, before this provision took effect.

The first provision ever made for commutation of fuel and quarters was in the regulations of 1835, in these words:

"At stations where officers *serve* without troops and where there are no public quarters, the quartermaster general is *authorized* to cause quarters to be hired for them, *or if it be found more convenient*, to allow them a reasonable compensation. (148, par. 53.)

"When a commutation is made for quarters, a commutation will also be allowed for fuel, to be paid by the authority of the quartermaster general, not to exceed the average market price." (148, par. 55.)

Contrast with this language that of the regulation of 1863, which is in these words:

"When public quarters cannot be furnished to officers at stations without troops, quarters *will be commuted* at a rate fixed by the secretary of war, and fuel at the market price delivered."

But the regulations of 1835, so far as commutations are concerned, had no validity whatever, unless by virtue of section 9 of the act of April 24, 1816, just cited.

Let it be admitted, for the sake of the argument, that this statute authorized the President to make a regulation allowing compensation to officers in certain cases in the

form of commutations of fuel and quarters. Still the fact remains that the regulation of 1835 did not invest the officer with a *right* to these commutations, but only *authorized* the quartermaster general to allow them in the form of a reasonable compensation. On the other hand, the regulation of 1863, which, by the act of July 28, 1866, had been made a part of the law before these causes of action accrued, *invested the officer with a legal right* to the commutations in the cases therein indicated. It did not merely *authorize* the quartermaster to allow a reasonable compensation. It declared "*quarters will be commuted.*" This was the positive language of statutory law. That which had been a matter of executive discretion under the regulation of 1835 became a matter of fixed legal right under the act of July 28, 1866, and was no longer left within the control of any executive department of the Government. The regulations of 1835 on this subject were renewed in 1841. The regulations of 1847 did not embrace the administrative duties of the staff departments, but left the former regulations thereof unchanged. The regulations of 1857 and 1861 were, as to commutations of fuel and quarters, identical in language with those of 1863.

The secretary of war, in his letter of transmittal to the attorney general, makes the following statement:

> The general rule which has governed the practice of this department *is based upon the principle, announced long since by the accounting officers of the treasury, that the allowance for fuel and quarters was not a right of statutory authority, but a matter of executive regulation,* under which this allowance belonged to officers as a matter of right only when they were assigned to some particular duty or work for the Government, or was granted to others only for strong reasons in executive discretion. Such special allowance, it is believed, has been generally confined to cases where officers were ordered to some place other than their established residence to await assignment to some particular duty upon which they were afterward placed.

The precise legal attitude which this letter is expected to take before the court is not apparent. It purports to

give the secretary's views of the practice of the war department, and of the principle on which it is based, and his opinion on certain points therein suggested. What the *actual* relations of the secretary to the letter were it does not appear. Nor is it material to inquire if the letter is looked upon, in its true light, as a mere *administrative act* in writing. For *as such* it is equally valid whether the secretary, upon consideration, actually prepared it himself, or merely signed, in the ordinary way and without consideration, a paper prepared to his hand by a staff-officer or clerk. But if the letter is offered as a *rule* of *exposition for the court*, it ought to be something more than merely the letter of a subordinate perfunctorily signed in routine by the secretary. And yet there is nothing on the face of the paper, or in the circumstances of the case to warrant the belief that the secretary, who, being a civilian, had been at the head of the war department only a few weeks when it was written, would be willing to offer his own opinion on such subjects as a rule of interpretation for this court. But suppose it to have been the actual production of the secretary himself. Then, of course, it presents the best of the knowledge and opinions which his multifold duties had permitted him to acquire or form on the subject during his brief incumbency of the office. But his opinions as to the principles involved in the case are not *facts* nor *evidence of facts* for the court. They are but *arguments* at best. Nor are his generalizations of the showings of the papers transmitted evidence as to the decisions of the war department. The papers themselves constitute not merely the *best*, but the *only* evidence which he presents as to the nature of those decisions.

The language of this statement exhibits in a strong light the radical misconception of the constitutional powers of the executive officers of the government, which underlies some of the rulings of the war department, made on this subject since the passage of the act of July 28, 1866, which adopted the regulations of 1863, as a part of the public law. He says: "The allowance for fuel and quarters was *not a*

right of statutory authority, but a matter of *executive regulation*." This presents in an unqualified form the erroneous view that the regulation of the *compensation* of officers of the army falls within the scope of the *constitutional* powers of the *executive* branch of the government. It rejects the true doctrine, which is, in the language of the Supreme Court, that "the regulation of the compensation of the officers of the army belongs to the legislative department of the government." No provision of the regulations of 1863, or of any other regulations, respecting *commutations of fuel and quarters* had any validity except by virtue of antecedent or subsequent statutory enactment authorizing or adopting such regulations.

Under the statute of April 24, 1816, the President and his subordinates had a discretionary power over the regulations, *expressly conferred* by the statute. They were not *compelled* to adopt regulations allowing commutations in any case. *If* they were *authorized* by that act to allow commutations at all, they were authorized to do so in their own way. And by the regulations of 1835, as we have seen, they merely *authorized* the quartermaster general to allow commutations in his discretion. But from July 28, 1866, when the regulations of 1863 were made a part of the law, to remain unchanged, so far as they were of a legislative character, save by legislative authority, no discretionary power in the premises remained in the President or his subordinates. It was all withdrawn. The regulations of 1863 so enacted into law were thenceforth obligatory, *so far as the compensation of officers was concerned*, not at all by virtue of executive action, but wholly by virtue of statutory enactment. So far as modification or repeal was concerned they were wholly beyond the reach of executive power. The opinion that after July 28, 1866, and before March 1, 1875, any executive officer of the government had the power, upon a given state of facts, to exercise a discretion as to the allowance or disallowance of commutations of fuel and quarters, is therefore utterly erroneous. It was, of course, for the proper military authorities to issue the or-

ders which *fixed the facts of the case.* But the facts having been fixed the law gave or withheld the commutation. Any exercise by an executive officer of a discretion to give or withhold was a usurpation of power, and a violation both of the law and the constitution.

We proceed now to an examination of the eight decisions set forth in the report of the war department on pages 4 to 28, inclusive, of the statement of stipulated facts. The first and second were made in the cases of Colonels Gates and Lippitt, respectively, and are both shown in the communication of Acting Q. M. Gen. Thomas, on pages 4 and 5 of the statement. In the case of Col. Gates, commutations of fuel and quarters *were allowed* to the officer while awaiting orders. Acting Q. M. Gen. Thomas, says:

"In the case of Colonel Gates, referred to by you, commutation was allowed on the decision of Attorney General Black, by order of Secretary Floyd. To test the universality of that decision, an estimate was made for commutation of quarters for officers "awaiting orders," which was submitted to the Committee on Military Affairs; but no money has ever been appropriated for such a purpose. Subsequent accounts presented by Colonel Gates for a similar allowance have been disallowed."

The following is the decision of the attorney general in this case: (9 Opinions Atty. Genl., 376:)

"ATTORNEY GENERAL'S OFFICE, *July* 27, 1859.

"SIR: It appears from the papers of Colonel Gates, submitted by you for my opinion, that he, being in command of the Third Regiment of Artillery at New York, on the 3d of April, 1854, received orders to relinquish his command to the junior major, and on the next day he was directed "to await further orders from Washington." No further orders since that time having been given him, he claims commutation for quarters and fuel under the general Army Regulations. Commutation is allowed by Army Regulations No. 974 for quarters, when public quarters are not furnished.

"In my opinion, Colonel Gates, never having been relieved from the duty of awaiting further orders from Wash-

ington, is properly to be regarded as under orders and on duty, and therefore entitled to commutation.

"He was in the line of duty while awaiting further orders to be given as much as he would have been while executing such further orders, if they had been given.

"Very respectfully, your obedient servant,

"J. S. BLACK.

"THE PRESIDENT."

The facts, then, as shown by the communication of the acting quartermaster general and the decision of the attorney general are these: In 1859, while the regulations of 1857 were in force, which regulations were adopted under the act of April 24, 1816, and were, so far as commutations were concerned, identical with those of 1863, the President of the United States called upon his constitutional adviser, the attorney general, for his opinion as to the right of an officer awaiting orders to commutations of fuel and quarters. The regulation of 1857 on the subject, as it had the same form with the regulation of 1863, also had the same effect and force which the latter regulation had *before its enactment into positive law on the 28th day of July*, 1866. And yet the attorney general, referring to that regulation, decided that Colonel Gates was in the line of duty while awaiting further orders to be given as much as he would have been while executing such further orders, if they had been given, and was therefore entitled to commutations of quarters and fuel. The President and secretary of war adopted the decision of the attorney general, and Colonel Gates was paid. Here, then, was a decision by the President and secretary of war, adopted after a call upon and response by the attorney general, in accordance with the solemnities of the constitutional provision. It would seem that if anything in the form of executive action could furnish a binding rule of interpretation for this court, such rule must be furnished by this decision. The acting quartermaster general, however, in the second (Col. Lippitt's) case, set forth in the same communication, overruled all this and held that officers awaiting orders were not entitled to commutations. But what

could be more preposterous than to set up the opinion of a staff officer as a reversal of this decision of the President, attorney general, and secretary of war? What could be more indefensible than the evasion of this authoritative rule by subordinates of the quartermaster's department on the frivolous pretexts here alleged? Does it not savor of insubordination, not to say impertinence, for a staff officer to talk of "testing the universality" (whatever that may mean) of a decision of the President, attorney general, and secretary of war on this subject by an appeal to a military committee of Congress?

The acting quartermaster general does not state when the "universality of the rule was tested." But the Statutes at Large contain appropriations for commutations made every year since that decision was made, and if the appropriations have not specified officers "awaiting orders" the reason has not been because Congress accepted the acting quartermaster general's conclusion that officers awaiting orders were on leave, but because Congress accepted the decision of the President, attorney general, and secretary of war (which was also the decision of the Supreme Court in Williamson's case) that officers awaiting orders were on duty and not on leave, and therefore saw no grounds for separate appropriations.

The assertion that the authoritative ruling of the war department in these two cases binds this court to construe the regulation of 1863 as the appellants would have it construed is monstrous. It inverts all just ideas of executive subordination by permitting an inferior military officer to sit down upon the President, secretary of war, and attorney general all at once. And it presents a sheer burlesque upon all just ideas of judicial authority and independence by setting up the same military subordinate as master of the conscience and judgment of this court.

In the third case, that of General Rosecrans, commutations of fuel and quarters were *allowed* December 23, 1864, upon the advice of General Halleck, chief of staff, by E. M. Stanton, secretary of war. (Page 6.)

In the fourth case, (page 6.) General Belknap was refused commutations; but the only reason given was this:

"QUARTERMASTER GENERAL'S OFFICE,
WASHINGTON, D. C., *June* 9, 1866.

"Gen. WM. W. BELKNAP,
Keokuk, Iowa:

"SIR: In reply to your letter of the 31st ult., you are respectfully informed that officers "awaiting orders" are not entitled to commutation of fuel and quarters.

"Very respectfully, your ob. servant,
"By order of Q. M. Gen'l.

"J. J. DANA,
Colonel, Bt. Brig. Gen."

In the fifth case, (page 11,) transmitted by the secretary of war, commutations were *allowed* to General Sturgis June 4, 1869, with the approval of General Sherman, by J. A. Rawlins, secretary of war.

In the sixth case, that of General Heintzelman, (page 12,) commutations were refused. But the following is the only ground alleged for such refusal:

"The within application is not favorably considered.
"WM. W. BELKNAP,
Secretary of War.

"WAR DEPARTMENT,
January 20, 1870."

In the seventh case commutations were refused to Colonel Carrington (page 13) August 2, 1869.

In the last case (Major Mayer's) fuel and quarters, (*not* commutations) were refused October 28, 1870. (Pages 16, 17.) The only reason assigned for the decision is that "the secretary, (Belknap,) considers him not entitled to fuel and quarters." No human ingenuity can reconcile the decisions in the cases of General Sturgis and Major Mayer. It is absolutely certain that the war department had not, *after July* 28, 1866, a discretionary power to *allow or disallow* commutations of fuel and quarters to officers awaiting orders. It is certain that after that date officers awaiting orders either were *absolutely entitled* by law to such commu-

tations, or were *absolutely disqualified* to receive them. If the war department had power to allow them in one case it had not power to refuse them in another. If it had power to refuse them in one case it had not power to allow them in another.

It is respectfully submitted then that the authority of the war department is not in favor of the construction demanded by the appellants, but on the contrary is directly opposed to it; that whether considered in respect of their official or personal authority, the three decisions of the President, attorney general, and three successive secretaries of war, approved by Generals Halleck and Sherman, evidently outweigh the five adverse decisions of Colonels Thomas and Dana, and Secretaries Rawlins and Belknap.

The decisions of the treasury department exhibited in the statement of stipulated facts, are embraced in two documents signed by E. J. Phelps, six signed by J. M. Brodhead, and one signed by J. M. Cutts. Neither one of these nine documents relates to any party to either of these actions. And the only uses which the documents can possibly subserve in the cases at bar are to show the opinions and practices of these officials respecting commutations of fuel and quarters, and thereby furnish (not a *binding rule*, of course, but only) an *argument* for this court on the subject. All of these rulings, except the last, were made before the act of July 28, 1866, was passed, and the last was based upon the others, without the slightest reference to or consideration of that act or of the difference between the regulation of 1835 and that of 1863.

The first case is that of Major Chase, (page 19,) decided in 1851 by comptroller Phelps, who withheld commutations of fuel and quarters. But Major Chase *was not awaiting orders.* He was *absent on leave.* It is difficult to see what bearing this decision can have upon the question now under consideration. The second document (page 21) does not present a case decided by Mr. Phelps, but is merely a

letter addressed in 1851 to the quartermaster of the *marine corps*, in which, after premising that *officers of the marine corps* had presented claims for transportation and for fuel and quarters when on *leave of absence*, to the accounting officers, without at the same time presenting the facts necessary to a proper understanding of such claims he proceeds to prescribe certain regulations for the presentation of such claims. Having disposed of the business in hand, he adds: "Officers on leave of absence or awaiting orders are not entitled to fuel or quarters. An officer to be entitled to these allowances must be assigned to some specific duty at the place where he claims them, and must make his requisition upon the quartermaster for them. An officer who receives his quarters in kind must draw his fuel in kind also." Whether he refers to officers of marines or to army officers it does not appear. If he refers to the former, it is immaterial to the pending cases whether he is right or wrong. But if he refers to officers of the army, then so far as officers awaiting orders are concerned, it is to be remembered that the provision of the regulations of 1835, reproduced in 1841, which was the only authority for the allowance of commutations in 1851, merely *authorizes* the quartermaster to make the allowance, leaving the whole subject within the control of the executive department of the government. And if he had been right in his view of the rule under the law and regulations in force in 1851, his opinion could not have a feather's weight in a case arising under the act of July 28, 1866.

In the third document (page 22) Mr. Brodhead says, October 14, 1853, that Col. Long's allowances for fuel and quarters were chargeable not to the army appropriation, but to the appropriation for the improvement of rivers and harbors on which that officer was employed. This decision has no bearing upon the cases at bar. He repeats a remark of the secretary of war to the effect that the allowance for quarters and fuel was not like pay and subsistence, an absolute right pertaining under all circumstances to the officers' rank but depended on certain con-

ditions of duty and service. This is obviously true. Under the regulations of 1835 the officer while, (as decided in the case of Col. Gates,) he had the same title to commutations when awaiting orders, as when executing specific orders, yet *had no absolute right to commutations under any conditions* of duty and service. Under the act of July 28, 1866, and the regulation of 1863, he has *no absolute right* pertaining under all circumstances to his *rank;* but he has an absolute right *when the conditions prescribed in the regulation occur.*

In the fourth case, (page 23,) Major Marston, of the marine corps, who had been ordered "to proceed to Boston and await there or in the vicinity further orders," went to Bristol, Rhode Island, in 1853, and demanded commutations of fuel and quarters for the time he remained at Bristol. Mr. Brodhead, March 4, 1854, refuses the allowance, on two grounds: first, that the order did not place him on duty at Bristol; and, second, that it did not place him on duty anywhere else. And he adds the general proposition that an officer of the army or marine corps is not entitled to commutation unless assigned to specific duty. Now, the fact that Major Marston was ordered to Boston and not to Bristol was decisive of the case. The assertion that the order did not place him on duty anywhere is incorrect, if the decision of the Supreme Court in Williamson's case is applicable, as it obviously must be, to cases of officers of marines. The proposition that officers were not entitled to commutations unless assigned to specific duty was based upon the decisions already mentioned, and, (to say nothing of the decision in the case of Col. Gates,) in the presence of the act of July 28, 1866, enacting the regulations of 1863, is entitled to no consideration in the pending controversy.

The fifth case (Captain Macrae's) was decided in 1854 by Mr. Brodhead, (page 24,) who rejected a claim for commutations of fuel and quarters while awaiting orders, on two grounds: (1) because Captain Macrae had made no requisition on the quartermaster for fuel and quarters; and

(2) because, so far as commutations were concerned, "absent on leave" and "awaiting orders" were convertible terms. On the first point enough has been said on pages 34 and 35 of the brief in Chilson's case. The erroneous conclusion on the second point is based upon the decisions already cited, and is an apt illustration of the gradual development of a clumsy dictum into a so-called established precedent.

Mr. Brodhead's incidental statement that under the law of 1835 naval officers received the same compensation when on leave as when awaiting orders has no weight in the case. Under the revised statutes now in force the same thing is true. But it is also true that the same revised statutes allow officers of the army *full pay* when awaiting orders.

The sixth case, which was Captain Reno's, (p. 25,) was decided in 1855, before the adoption of the regulations of 1857, by Mr. Brodhead, who simply based his decision upon the cases already cited.

The seventh of the authorities furnished consists of a letter from J. M. Cutts, second comptroller, dated June 21, 1859, to A. J. O'Bannon, fourth auditor, in reply to an inquiry based upon a hypothetical case put by the auditor, (page 25.) Mr. Cutts says that "it is difficult to decide upon supposititious cases generally;" that an officer in order to be entitled to commutation of fuel and quarters must be assigned to some specific duty, and must make his requisition for fuel and quarters.

In the eighth and ninth cases, those of Major Green and General Fremont, decided in 1864 and 1867 respectively, Mr. Brodhead bases his decisions on the same precedent. He made the latter decision apparently in complete ignorance of the statute of July 28, 1866, as well as of the difference between the regulation of 1835 and that of 1863.

It appears, therefore, that, with a solitary exception, all of these nine opinions of the comptrollers which, under the appellants' new canon of statutory interpretation, are to furnish the court a rule for the construction of the act

of July 28, 1866, and the regulation of 1863, were pronounced before that act was passed, and all but three referred to the regulation of 1835, which differed in form and substance from that of 1863 by merely clothing the quartermaster with *authority* to make a reasonable allowance for fuel and quarters, instead of vesting in the officer a right to commutations, and which differed from the regulation of 1863 also in this: that while the regulation of 1863 was, after July 28, 1866, a positive statute, that of 1835 had no force whatever, except such as the President was able and saw fit to give it under the authority conferred by the act of April 24, 1816. The appellants demand that the executive interpretation of a regulation which was wholly within the executive discretion not only as to its adoption, but as to its modification and execution, shall be a conclusive rule for this court in the interpretation by this court of another regulation enacted into law which lies as far beyond the reach of executive discretion as does any law of the United States. It is perfectly true that during the whole period from April 24, 1816, until July 28, 1866, with the exception of the single year (1821–'22) in which General Scott's regulations were in force, the President, if he had any authority to make regulations respecting commutations of fuel and quarters, like those of 1835, had complete control over them, and could make and unmake them, at his discretion, for all the power he had in the premises was conferred by the act of 1816. It is also true that the regulation of 1835 gave the officer no *right* whatever as against the judgment of the war department. But nothing of this kind is true as to the regulation of 1863 after its enactment into law by the statute of July 28, 1866.

II.

But it may be claimed that the regulations of 1863 relating to commutations of fuel and quarters were origi-

nally adopted by the war department under the authority of the act of April 24, 1816, and until enacted into positive law by the statute of July 28, 1866, had only such force and effect as the war department saw fit to give them, and therefore when they became laws they became laws with such meaning and effect as the war department had seen fit to give them while mere executive rules, subject to executive amendment, suspension, enlargement, construction, and repeal.

The answer to this is very plain. In the first place, while it is very clear that if the war department was, under the act of 1816, *authorized* to make a regulation *granting commutation of fuel and quarters* to officers, it was *not compelled* to make any such regulation, but on the contrary was at liberty at any time by regulation to withhold such commutations; at the same time it is equally clear that when a formal regulation, adopted while the war department in the lawful exercise of its discretion could withhold or grant commutations, becomes *a law* by act of Congress, the courts are to interpret it as they interpret other laws, and not by looking at the practices of the war department under the regulation before it became a law, which practices the war department *was not legally bound to conform to any particular written regulation*, because it could at any time abrogate that regulation and make a new one in its stead.

In the second place, if the act of April 24, 1816, instead of authorizing the President and secretary of war to alter the regulations at their discretion, had merely authorized the secretary of war, with the approbation of the President, to adopt a regulation respecting commutation of fuel and quarters, and had provided that such regulation, when once adopted, should be of permanent obligation, with no authority on the part of the secretary or President to alter it, even in that case, while there would be a strong presumption that the men who actually framed the regulation knew what they meant by it, whatever might be the presumption as to their successors in office, still, when en-

acted by subsequent statute into a positive law, the regulation would come before the courts subject to the same rule of construction which obtains in ordinary cases. That rule is stated by the Supreme Court in these words:

"Where a law is plain and unambiguous, whether it be expressed in general or limited terms, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction."

In the third place, the alleged practice which the assistant attorney general seeks to set up as a rule of statutory construction for this court is not a practice originated by the *war department* at all, but is a practice suggested and initiated by a subordinate officer of the treasury department. This is remarkable, but it is absolutely true. The secretary of war, in his letter of transmittal, says: "The general rule which has governed the practice of this department is based upon the principle *announced long since by the accounting officers of the treasury*, that the allowance for fuel and quarters was not a right of statutory authority, but a matter of executive regulation." So this construction of an army regulation which is offered as conclusive upon the court is not a construction by the war department, but a construction by the second comptroller. But if the secretary of war could, as he cannot, claim the exclusive right to expound an army regulation enacted into law by Congress, on what possible ground can a second comptroller be made the final interpreter of army laws or regulations?

In the fourth place, the decision of the second comptroller on this point is entitled to no weight even as an argument. It originated, as we have seen, in a letter relating to officers of marines *on leave of absence* written by comptroller Phelps in 1851, while the law of April 24, 1816, and the regulations of 1835 were in force, in which letter the comptroller made an incidental remark to the effect that officers awaiting orders were not *entitled* to fuel or quarters. That dictum having been repeated three

times by comptroller Brodhead, while the act of 1816 and the regulation of 1835 were in force, was finally in one instance recognized by him as the rule after the enactment of the law of July 28, 1866. But when he so recognized it he was evidently wholly oblivious of the changes in regulations and legislation which had occurred since the enactment of the law of April 24, 1816, and the adoption of the regulation of 1835. Certainly a careless, undiscriminating reiteration by a comptroller of a statement which if once *literally* true had ceased to be so, is not a cogent argument, much less a conclusive authority, for this court in the construction of laws of the United States.

But, in the fifth place, as we have seen, the President, the secretary of war, and the attorney general expressly decided in 1859 that officers *awaiting* and officers *executing* orders were *equally* entitled to commutations of fuel and quarters under the regulations of 1857, which were in words identical with those of 1863, but which had not then been enacted into law, as were the regulations of 1863 by the act of 1866. The decision was repeated by two successive secretaries after July 28, 1866, with the approval in each case of the highest officer of the army. And if an acting quartermaster and a second comptroller had not risen up to defy and trample on that decision, we should probably never have heard it questioned to this day.

III.

The next stipulated fact is that a number of officers ordered home to await orders reported, without permission or objection from the war department, from different places. This fact is urged by the appellants as evidence that officers ordered home to await orders had a legal right to await orders *wherever* they saw fit, and that the war department and the officers themselves understood the law so to be. Our argument on the legal bearing of this fact is fully presented on pages 19 to 25 inclusive of the brief in Chilson's case, and will not be repeated. But a few words respecting the fact are necessary. It is stated in

the stipulation that about seventy officers reported from different places the places from which each reported, numbering from *two* to *six*. But of these only *four* reported from six places; the majority reported from only two. And of the residue of the 129 officers, shown on page 18 of the stipulated facts to have been ordered home to await orders, it does not appear that a single one reported from more than one place. How many of those who reported from different places can and how many cannot prove actual *bona fide* changes of home will be known at the proper time when their respective cases are tried and not before.

IV.

The *fact* that since July 28, 1866, the war department has issued forty or fifty orders modifying the army regulations is suggested by the appellants as a *legalization* of an alleged right of that department to alter and regulate the *compensation* of army officers, so far as commutations are concerned, even in the face of the act of July 28, 1866. But if these orders had all affected the *compensation* of army officers, they would only show that the war department had on forty or fifty occasions, in violation of the constitution and of the act of July 28, 1866, assumed to exercise the legislative function of regulating the compensation of officers of the army, which this court in Williamson's case held to be within the exclusive authority of Congress. If, however, these orders did not touch the compensation of the army, but merely embraced provisions executive or administrative in character, the power to issue them was *conferred by the Constitution, and neither was nor could be withdrawn by the act of July* 28, 1866. And obviously the *fact* of issuing orders which the war department *had authority* to issue, could not *legalize* the issue of orders which that department *had not authority* to issue.

The truth is, that of these forty or fifty orders only four or five touched the subject of *army compensation*. The others all or nearly all embraced matters *clearly executive or administrative* in character, and indisputably within the constitu-

tional powers of the executive branch of the Government. One of the orders affecting the compensation of officers changed the *commutation prices of rooms* at different points in the United States. But by section 1080 of the regulations of 1863, which were enacted into law by the statute of July 28, 1866, it is *expressly* provided that the commutation prices of rooms are to be such as the secretary of war shall prescribe. This order was therefore *expressly authorized* by law. But another order affecting the compensation of officers increased the allowance of fuel in certain months and latitudes, and *was not authorized* by law. And the *amount of fuel embraced in the judgments in the cases at bar is that which is fixed by section* 1068 *of the regulations of* 1863, *not that which is fixed by the subsequent order.*

V.

The appellants' counsel think there is no good reason why commutations should be allowed to officers awaiting orders; just as they thought in Williamson's case, and, notwithstanding the decision of the Supreme Court in that case and the express provision of section 1265 of the revised statutes, probably still think that there was no good reason for allowing to an officer awaiting orders more than half pay. But the question is not what the law ought to be, nor what this or that person thinks it ought to be, but what it really is. Certainly no man's opinion of the reasonableness of the law can be operative to nullify it. And, then, the reason for allowing fuel and quarters to officers awaiting orders was a sound one. It was a principle of universal application that the government furnished the officer, when not on leave of absence, with fuel and quarters. This principle obtained in the field as well as elsewhere. But the character of the supply was determined by the circumstances of the case. Houses cannot be transported in the train of an army in campaign. Tents or huts must take their places. And fuel must in many cases be seized on the spot. But fuel so taken was used, not as the private property of the officer, but as the public property

of the government, appropriated by right of eminent domain or by right of war. It was furnished to the officer by the Government, just as really as if purchased in market and delivered to him. When the officer was not serving with troops the supply took another form. But in all cases when the officer was not on leave of absence the supply was due in one form or another. Any other view of the case compels the admission that our government discriminated against service in the field and in favor of post duty, by according to the latter compensation which was withheld from the former. The comparative importance or unimportance of an officer's duty when not in the field does not affect his title to commutations any more than does his valor or efficiency in the field affect his title to fuel taken by right of war or eminent domain.

VI.

It was asserted in the court below, and may perhaps be reasserted here, that the appellees have virtually *admitted* the power of the war department to change the regulations as to compensation of army officers by basing their actions upon orders made since July 28, 1866. *But this is wholly erroneous.* The mileage claimed and adjudged in Phisterer's case was *not* by the "shortest route usually traveled," but, as the war department estimated it, "by the shortest practicable route," than which the "shortest mail-route" cannot, of course, be shorter. The commutation price of rooms, as we have seen, is under the regulations of 1863 to be fixed by the secretary of war, and the amounts allowed in these cases were so fixed. The amount of fuel actually allowed was that fixed by the regulations of 1863, *not* that fixed by the order of November 23, 1868.

VII.

The counsel for the Government think that the act of July 28, 1866, gave the regulations on the subject of com-

mutations no effect as law beyond what they had before the act was passed. But herein they misconceive the effect and scope of that act. They read it as if it provided that the regulations should remain in force, *subject to the power of the war department to alter or abrogate them* under the statute of April 24, 1816; whereas the provision is that they shall "remain in force *until Congress shall have acted* on said report." So long as they stood under the act of 1816 the provisions as to commutations were executive rules subject to executive control. But the act of 1866 *withdrew them from executive control*, and fixed them as law *until Congress* should change them.

The defendants are equally mistaken as to the reason of the provision of July 28, 1866. If that were a legitimate subject of inquiry here it could easily be shown, as the fact is, that the provision was drawn by Gen. Schenck, the chairman of the House military committee, because that committee, upon a careful consideration of the subject in 1866, reached the conclusion that during the entire war those provisions of the army regulations which were *legislative in their nature*, had been without constitutionality or validity except such as had trickled down from the act of 1816, or had in dubious ways, from time to time, oozed out of the appropriation bills. They resolved to give them validity in the first place, and in the second place to put them beyond subsequent executive control. And that is precisely what was accomplished by the provision of July 28, 1866.

VIII.

Lynde's case differs from Phisterer's in this, that no depositions have been taken to show where the former's home was, or to prove that he changed his home. It is insisted that in the absence of evidence tending to impeach the official character of the officer, his official reports, prescribed by and furnished under the law, are *prima facie* evidence of their own truth, and show *presumptively* where the

officer's home is, and, when he reports from two different places, that he has in good faith changed his home.

Phisterer alone recovered mileage. On this point the appellee's brief, in the case of the United States *v.* Mears, No. 960, is submitted as a part of this brief.

HALBERT E. PAINE,
BENJAMIN F. GRAFTON,
For Appellees.